INDEX

CITATIONS

749-480—64——1

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 35

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

AMERICAN TRAILER RENTALS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

1. A CHAPTER XI ARRANGEMENT IS NOT THE ONLY FEASIBLE METHOD OF REHABILITATING THE DEBTOR'S BUSINESS

Throughout the respondent's brief (pp. 9, 17, 18, 19, 20, 21, 22, 24, 25) runs the contention that its business can survive only through the proposed Chapter XI arrangement and that the grant of the Commission's motion would lead to total collapse of the enterprise with attendant losses to all interests. Such a contention has been made in virtually every Chapter XI proceeding which the Commission has sought to

transfer to Chapter X.[1] An adjudication in bankruptcy is, of course, always possible when a debtor seeks relief under one of the rehabilitation procedures of the Bankruptcy Act, but adjudications in bankruptcy have occurred more often after denial of a motion by the Commission under Section 328 than after the grant of such a motion.[2]

Moreover, further financial difficulties are more likely after a Chapter XI proceeding than after a Chapter X proceeding—presumably because the latter

---

[1] For example, in *General Stores Corp.* v. *Shlensky*, 350 U.S. 462, the debtor's president submitted an affidavit that proceedings under Chapter X would endanger the debtor's interests in its only assets, two wholly-owned subsidiaries whose stock the debtor had pledged (Record, No. 170, O.T. 1955, 45a–46a).

[2] From July 1, 1953, to date there have been fourteen proceedings in which motions of the Commission under Section 328 of the Bankruptcy Act have been granted. Six of the debtors involved were subsequently reorganized under Chapter X, five Chapter X proceedings are pending, and only three of the debtors were adjudicated bankrupt. During the same period there were ten Chapter XI proceedings in which the Commission's motions to dismiss were denied, and of these only two of the debtors have consummated an arrangement, three proceedings are pending and five have been adjudicated bankrupt. See Appendix A, *infra*, p. 10.

Respondent states (Br. 19, fn. 5), without explicit citation, that Volumes 25–29 inclusive of the Commission's Annual Reports show that the Commission made motions to dismiss in nineteen Chapter XI cases, of which fifteen were granted, and that of these "eight ended in ordinary bankruptcy." These reports do show that during the years they cover (fiscal 1959 through fiscal 1963) nineteen such motions were made by the Commission, but, as shown by Appendix A, *infra*, only eight of the motions were granted, and not eight but only three of the corporations involved in these eight cases were adjudicated bankrupt.

permits a far more thoroughgoing reorganization than the former. The Commission's experience has been that bankruptcy proceedings rarely occur after a Chapter X plan has been consummated, and it is common knowledge that companies which undergo a readjustment of their unsecured debts under Chapter XI not infrequently find it necessary to make another trip to the bankruptcy court. This Court has warned that unless there has been the complete inquiry into a company's affairs and prospects which Chapter X contemplates, the debtor's "revived financial life" after a Chapter XI proceeding might be "too short to serve any public or private interest other than that of [the company]" (see *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U.S. 434, 456; and that "[w]ithout a new management today's readjustment [under Chapter XI] may be a temporary moratorium before a major collapse" (*General Stores Corp.* v. *Shlensky*, 350 U.S. 462, 466).

The various advantages of the proposed Chapter XI plan to which respondent refers (Br. 11–17, 38–39) would also be available under Chapter X. A plan under Chapter X could provide for: a new corporation; the transfer of the trailer rental system to it; the conversion of public investor-creditors into stockholders; settlement of the claims of other creditors; new management (which might well be necessary); and a trustee who could maintain interim operation of the system, could employ present management to

assist him,[5] and, if appropriate, could provide trailer location information to investor-creditors wishing to withdraw their trailers.[6]

The statement that "the order of transfer and appointment of a trustee, essentially a receiving order, would terminate all leasing agreements concerning the trailers" because "[t]he leases in question provide for automatic termination upon entry of a receiving order" (Br. 17–18) is not supported by the record. The only trailer lease admitted into evidence (Commission Exhibit E, Tr. 590–591) was described as "typical" of the "greater majority" of the debtor's leases (R. 104). It provides that the term of the lease is ten years and it contains no provisions for termination prior to the end of the term, except if the trailer is destroyed or stolen. (The lease is not a part of the printed record; it is reprinted in Appendix B, *infra*, pp. 12–15.

Moreover, the record does not support respondent's claim (Br. 11) that the proposed plan provides a "workable method of meeting the needs to be served."

---

[5] While the debtor's peak monthly income of $60,000 had diminished to $14,000 by the time the Chapter XI petition was filed, and as a result of trailer withdrawals has necessarily diminished further since then, the record indicates that the debtor continues to have income from trailer rentals (R. 93). Such income was approximately $4,000 per month when the Commission filed its motion to transfer (Tr. 292), and was expected to increase (R. 113).

[6] The record does not support the claim that ordinary bankruptcy would mean probable total loss for public investor-creditors (Br. 18–20). No reason appears why a trustee in bankruptcy could not maintain trailer location records or why the receipt of trailers by public investor-creditors would entail any more loss to them than has been incurred by those who have already withdrawn a total of about 3600 trailers (Br. 14).

Although the debtor believed that it would need many thousands of trailers to operate profitably (R. 76, 115–116, 127), the reorganized company would have only a relatively small number of them available after the arrangement.* Indeed, it cannot even count on all the trailers that are now in the system, since dissenting trailer owners cannot be forced to transfer their trailers to the new company. See Section 367(1) of the Bankruptcy Act, 11 U.S.C. 767(1). Furthermore, the record does not show that the reorganized company could obtain the capital necessary both for purchasing the additional trailers (apparently needed for profitable operation) and for other purposes (R. 157, Br. 15). In short, "this business needed a more pervasive reorganization than is available under c. XI" (*General Stores Corp.* v. *Shlensky*, 350 U.S. 462, 468).

2. CHAPTER XI DOES NOT PROVIDE ADEQUATE PROTECTION FOR PUBLIC INVESTOR-CREDITORS WHOSE RIGHTS ARE TO BE READJUSTED

In our main brief we urged (pp. 22–39) that public investor-creditors require the protection which Congress provided in Chapter X for investors in corporations undergoing reorganization, and pointed out several reasons why such protection is particularly needed in the present case. The *amici curiae* (who are parties to the *Securities and Exchange Commission* v. *Burton* case, No. 6623, which is now pending before the Court of Appeals for the First Circuit on the Commission's appeal from an order refusing to transfer a Chapter XI proceeding to Chapter X)

*The debtor estimated that 2000 trailers would be surrendered under the proposed plan (Br. 7–8). In addition, Capitol owns 299 trailers (R. 5).

urge (Br. 19) that this Court's decision should not go beyond the particular facts involved in the present case. They state (Br. 20–21, 25–26) that in the *Burton* case procedures have been provided in the Chapter XI proceeding that give substantially the same protection to public investors that Congress provided in Chapter X, and that in a Chapter XI proceeding the Commission "as an intervenor, can participate in the necessary determination by the referee and the court just as effectively as in a Chapter X proceeding * * *."

Of course, the Court decides only the particular case before it. In deciding this case, however, we think it would be appropriate for the Court to announce, as a governing principle, that transfer to Chapter X is required whenever the rights of public investor-creditors will be adjusted in the reorganization.* We have set forth in our main brief the reasons why we believe that this principle is sound. We urge this Court, if it agrees with us, to announce the principle because, in this area of the law, it is desirable for the lower courts to have the clearest possible guidelines in order to minimize litigation which not only burdens the Commission and the lower courts, but also delays necessary financial rehabilitations of distressed corporations.

In any event, the *amici's* argument rests upon misconceptions as to both the scope of the Commission's

*But cf. *Securities and Exchange Commission* v. *Crumpton Builders, Inc.* (C.A. 5, No. 20712, decided October 21, 1964), where the court, in reversing a district court's refusal to transfer a Chapter XI proceeding to Chapter X, seemingly refused to adopt any broad principles and held only that, on the facts of the particular case, "the district court went beyond sound judicial discretion" (slip op., p. 14) in denying a transfer.

participation in a Chapter XI proceeding and the extent of the protection which the latter may provide for public investor-creditors. Chapter XI does not authorize the Commission to participate, except to the limited extent of filing a motion under Section 328 to transfer the proceeding to Chapter X.[7] If the district court denies such a motion, the Commission's powers and interest in the proceeding are at an end. Furthermore, even if the district court should provide some provisions specially designed to protect the public investor-creditors (such as the appointment of a receiver, which occurred in the *Burton* case), this would still fall far short of affording these investors the full measure of the protection which only Chapter X can, and does, provide. See *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U.S. 434, 449–451. Furthermore, since the motion to transfer normally is made early in the Chapter XI proceedings (in order to avoid delay), it is usually impossible to know at that time what additional protections, if any, the court may see fit to impose after all the pertinent facts have been developed in the course of such proceedings.

---

[7] The *amici* point (Br. 12) to the Commission's attempted intervention in this case in order to oppose the confirmation of the plan. As explained in our main brief (p. 14, fn. 12), the Commission sought to intervene in its capacity as administrator of the Securities Act of 1933, in order to prevent a distribution of securities under the plan which it believed would violate the antifraud provisions of that Act (Section 17(a), 15 U.S.C. 77q(a)). The attempted intervention was merely a substitute for an injunction action that the Commission might otherwise have brought against the debtor (see Section 20(b) of the Securities Act, 15 U.S.C. 77t(b)) had the latter not been under the exclusive jurisdiction of the bankruptcy court.

749-480—64——2

In short, the possibility that the district court may improvise some protective procedures in a particular case is not an adequate substitute for the many specific protections which Chapter X provides in all cases. *Amici's* contention implies that it is appropriate for the district courts to devise on a case-by-case basis procedures for corporate reorganization which may then be employed as a substitute for mandatory procedures that Congress has specified in Chapter X.

The *amici* also contend (Br. 12–13) that the failure of the proposed plan of arrangement to provide "fair and equitable" treatment to the public investor-creditors is not a proper factor to be considered in determining whether transfer to Chapter X was required, on the ground that that issue may be raised only upon review of an order confirming the plan.[8] This contention misconceives the basic thrust of our argument on the "fair and equitable" point. Since the "fair and equitable" requirement was deleted from Chapter XI in 1952, it is obvious that a plan of adjustment under that Section could not be attacked for failing to meet that standard.[9] That is

[8] In *In re Lea Fabrics*, 272 F. 2d 769 (C.A. 3), to which the *amici* refer (Br. 12), the Commission did not seek review of the order confirming the plan, but only of the order denying its motion to transfer the proceedings to Chapter X.

[9] *Amici* argue (Br. 15, fn. 5) that the 1952 amendments "were far from 'uncontroversial.'" The only legislative history cited is the Treasury Department's objection that the deletion of the fair and equitable requirement from Chapter XI might "impair the requirement for the deposit of the moneys necessary to pay priority claims (including taxes)." H. Rep. 2320, 82d Cong., 2d Sess., p. 21. This hardly seems relevant to the points here being considered. *Amici* also refer to "examples in 9 *Collier on Bankruptcy* (14th Ed.) § 9.18(2.1) pp. 304–

precisely the reason why, in our view, transfer is required to Chapter X. In other words, since the rights of public investor-creditors cannot be adjusted in reorganization proceedings unless they receive full compensatory treatment before junior interests may participate (see our main brief, pp. 39–40), the fact that Chapter XI no longer requires that they be given such treatment is the very reason why any proceeding in which their rights are adjusted must be transferred to Chapter X, where the "fair and equitable" standard still applies.

CONCLUSION

For the foregoing reasons and those set forth in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
DANIEL M. FRIEDMAN,
Assistant to the Solicitor General.
PHILIP A. LOOMIS, Jr.,
General Counsel,
DAVID FERBER,
Solicitor,
DONALD R. JOLLIFFE,
Attorney,
Securities and Exchange Commission.

NOVEMBER 1964.

---

305)" but the references there are to a law review comment published ten years before the amendment (51 Yale L. J. 253, 275) and to a commentary discussing the legislation after it had been enacted (Seligson, *Bankruptcy*, 1952, Ann. Survey of American Law, 467).

APPENDIX A

OUTCOME OF PROCEEDINGS SINCE JULY 1, 1953 IN WHICH COMMISSION MOTIONS UNDER SECTION 328 OF THE BANKRUPTCY ACT TO DISMISS HAVE BEEN GRANTED OR DENIED

	Motion granted	Motion denied
Total	14	10
Plan consummated	6[1]	2[4]
Adjudicated bankrupt	3[2]	5[5]
Pending	5[3]	3[6]

[1] *In the Matter of Bruce Chemical Co., Inc.* (D.N.J., No. B 831-62) (Assets sold as economic unit pursuant to plan of reorganization) (Referred to in 29th Annual Report of the Securities and Exchange Commission, p. 96).

In the Matter of Dilbert's Leasing and Development Corporation (E.D.N.Y., No. 62 B 148). (Assets liquidated pursuant to plan of reorganization.) (Referred to in 29th Annual Report, p. 96.)

In the Matter of Dilbert's Quality Supermarkets, Inc. (E.D.N.Y., No. 62 B 920) (Assets sold as economic unit pursuant to plan of reorganization). (Referred to in 29th Annual Report, p. 96.)

In the Matter of General Stores Corporation (S.D.N.Y. No. 90894). (Referred to in 22nd Annual Report, pp. 178-179.)

In the Matter of Liberty Baking Corporation (S.D.N.Y., Civ. No. 91173) (Assets sold as economic unit pursuant to plan of reorganization). (Referred to in 23rd Annual Report, pp. 185-186.)

In the Matter of N. O. Nelson Co. (S. Mo., No. 12712(2)).

[2] *In the Matter of Daneen Stores, Inc.* (S.D.N.Y., No. 62 B 147). (Referred to in 29th Annual Report, p. 103.)

In the Matter of Dejay Stores, Inc. (S.D.N.Y., No. 62 B 727) (No Ch. X petition filed). (Referred to in 29th Annual Report, p. 96.)

In the Matter of Herald Radio and Electronics Corporation (S.D.N.Y., No. 60B-466). (See 27th Annual Report, p. 136.)

[3] *In the Matter of Coast Investors, Inc.* (W.D. Wash., No. 53448).

In the Matter of Crumpton Builders, Inc. (M.D. Fla., No. 63 42 T) (Denial of motion reversed on appeal). (Referred to in 29th Annual Report, p. 96.)

In the Matter of Hydrocarbon Chemicals, Inc. (S.D.N.J., No. B-743-63).

In the Matter of Vinco Corporation (E.D. Mich., No. 63-182). (See 29th Annual Report, p. 96.)

In the Matter of Yuba Consolidated Industries, Inc. (N.D. Cal., No. 64108).

[4] *In the Matter of Transvision, Inc.* (S.D. N.Y., No. 89661). (Referred to in 21st Annual Report, pp. 93-94.)

In the Matter of Wilcox-Gay Corporation (W.D. Mich., S. Div., No. 12735). (Referred to in 22nd Annual Report, p. 179.)

The annual reports of the Commission show that in the above period there were six additional Chapter XI proceedings transferred to Chapter X either following a motion made by the Commission under Section 328 which had not yet been acted upon, or after the Commission had suggested informally that Chapter X should be utilized. Five of these debtors have been reorganized under Chapter X,[7] and one debtor has been adjudicated a bankrupt.[8]

---

[7] *In the Matter of Alaska Telephone Corporation* (W.D. Wash., N. Div., No. 41632) (Assets sold as economic unit pursuant to plan of reorganization). (Referred to in 22nd Annual Report, p. 179.)

In the Matter of Cal-West Aviation, Inc. (N.D. Cal., No. 62708) (Assets being liquidated pursuant to plan of reorganization). (Referred to in 28th Annual Report, p. 103.)

In the Matter of Ehrlehofer & Arnold, Inc. (E.D.N.C., No. 2876) (Assets liquidated pursuant to plan of reorganization). (Referred to in 26th Annual Report, p. 160.)

In the Matter of Pickinson Trust Deed Corporation (N.D. Cal., N. Div., No. 57469) (Assets liquidated pursuant to plan of reorganization). (Referred to in 26th Annual Report, p. 159.)

In the Matter of Trustors' Corporation (S.D. Cal., No. 123, 776-Y) (Assets being liquidated pursuant to plan of reorganization). (Referred to in 27th Annual Report, p. 187.)

[8] *In the Matter of Precision Transformer Corporation* (N.D. Ill., No. 62 B 2032). (Referred to in 29th Annual Report, p. 97.)

---

[1] *In the Matter of Grayson-Robinson Stores, Inc.* (S.D. N.Y., No. 62 B-584) (Debtor's application for bankruptcy adjudication pending). (Referred to in 29th Annual Report, pp. 94-95.)

In the Matter of Lee Fabrics, Inc. (D.N.J., No. 4298). (See 28th Annual Report, pp. 159-160.)

In the Matter of Life and Industrial Companies, Inc. (E.D. Ark., No. LR 62B-177). (See 27th Annual Report, pp. 135-136.)

In the Matter of Los Angeles Trust Deed & Mortgage Exchange (S.D. Cal., No. 118, 178-Y). (See 28th Annual Report, p. 103.)

In the Matter of United Star Companies, Inc. (M.D. Fla., No. 62-4-BK-T) (Appeal pending). (Referred to in 29th Annual Report, p. 97.)

[6] *In the Matter of American Guaranty Corporation* (D.C.R.I., No. 62 B 17). (See 28th Annual Report, pp. 95-96.)

In the Matter of American Trailer Rentals Company (D. Colo., No. 33276). (See 28th Annual Report, p. 92.)

In the Matter of Canandaigua Enterprise Corporation (W.D. N.Y., No. bK-631964).

APPENDIX B

S.E.C.
Ex E
3-8-63

THIS AGREEMENT, made and entered this 24 day of MARCH, 1961 by and between PETER and-or JULIA BOHL hereinafter referred to as lessor and NORTH DAKOTA TRAILER RENTALS CO., a corporation organized under and existing by virtue of the laws of the State of North Dakota, hereinafter referred to as lessee; Witnesseth

1. That lessor in consideration of the covenants and agreements on the part of the lessee herein contained, does hereby lease to the lessee certain utility trailers described as follows:

Number: 1.
Size: 5'x12',
Type: Closed; all steel; 4 wheel moving vans.
Manufacturer: Demor Tra.
Serial No.: 3203-7-CBK.

together with such accessory equipment such as hitches, tarps, etc., delivered by the manufacturer as accessory parts, for use by lessee in its trailer rental system.

2. The leased trailers shall at all times remain and be the sole and exclusive property of the lessor and the lessee shall have no right in them, except as herein granted.

3. The lessee shall at all times and at his own expense keep the leased trailers in good and efficient working order and shall not permit anyone to deface or damage any of said trailers.

4. Lessor shall pay sales tax, if any, due upon purchase of said trailers, and all applicable license fees, taxes or permits required by any state or governmental authority for the purpose of permitting lessor's trailers to be operated upon public highways under the jurisdiction of such governmental authority. Lessee will procure said license and/or permits annually and deduct the amount of the fees thereof from rental due hereunder.

5. As rental for said trailer, lessee shall pay lessor 2% per month of the total dollars invested in trailers, in the amount of $22.36 monthly or the sum of $— quarterly for as long as this agreement remains in effect. Said payments to commence at the end of the first month (or quarter) following the effective date of this lease.

6. Said trailers have not been delivered to lessor by manufacturer and lessor cannot make delivery until receipt from the manufacturer. The effective date of this lease is the first day of the first month after notification by lessor or his agent that said trailers are ready for delivery to lessee. For this purpose, lessee is authorized to complete this lease by inserting the effective date first hereinabove provided for. The lessee is also authorized to insert the serial numbers of said trailers after notification of the same. Upon completion, lessee will provide lessor a completed copy of this lease executed by the executive officers of the company.

7. The term of this lease is for ten years from the effective date hereof, and at least 90 days prior to the expiration of this lease lessor will notify lessee which of the following options lessor will exercise:

A. Sell said trailers to lessee for 20% ($223.62) of lessor's original purchase price which amount, together with sufficient additional monies to make

the purchase, shall be used to purchase new trailers to be leased to lessee upon a similar lease arrangement as herein set forth upon forms then in use by the lessee at rental rates then being offered by the lessee for like trailers.

B. Sell said trailers to lessee for 10% ($111.81) of lessor's original purchase price.

C. Lessor may leave trailers in system for life time of trailers on a percentage basis of 30% of earnings after operational costs.

D. Take possession of said trailers at the nearest Central Exchange of lessee. Lessor shall have five days from the date of the expiration of this lease to remove said trailers from the premises of said Central Exchange and upon failure to remove in this time, shall subject said lessor and trailers to a reasonable storage charge thereafter.

8. Lessee shall maintain insurance upon said trailers in amounts sufficient to compensate lessor in the event of theft, damage or destruction, and in any of these events, the claim therefore shall be prosecuted by the lessee in its own name. In the event of damage, recovery of claim shall be applied to repair of said trailers. In the event of total destruction or theft, this lease will terminate as to such trailer and shall pay lessor the value of such trailer. Initial insured value shall be the purchase price of the trailer. Thereafter the insured value shall be reduced annually by 15% of the valuation of the preceding year for the term of this lease. Lessee will maintain comprehensive liability and property damage insurance that will save lessor harmless in case of accident.

9. Lessor shall at all times have the right to sell or transfer or assign his title to said trailers subject to this agreement or to sell or assign his rights and benefits under this agreement.

10. This lease is executed to cover more than one trailer, but a separate lease shall be prepared for each trailer covered by this multiple lease and upon execution of said separate lease agreements, said leases shall supercede this lease agreement.

IN WITNESS WHEREOF, the parties hereto have duly executed this instrument in duplicate this 24th day of March, 1961.

PETER BOHL,
JULIA BOHL,
Lessor.

NORTH DAKOTA TRAILER RENTALS CO.
By ALVIN MOLTZIN.

U.S. GOVERNMENT PRINTING OFFICE: 1965